STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM WIELEN, Plaintiff-Appellant,	UNPUBLISHED February 9, 2012
v	No. 298256 Bay Circuit Court
CITY OF BAY CITY, Defendant-Appellee.	LC No. 09-003155-CL

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff brought this action alleging that he was terminated from his employment as a refuse collection worker for defendant in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiff submitted evidence that, after he was hired in September 2008, he frequently irritated coworkers by reporting perceived equipment and safety violations that his coworkers considered trivial. On January 14, 2009, plaintiff and another refuse collector, Joe Oszust, were involved in a truck collision. Oszust was reprimanded for the incident but plaintiff received no discipline. According to plaintiff, Oszust and other employees harassed him and labeled him a "snitch" in response to Oszust's discipline. On January 22, 2009, the Director of Transportation, Tony Rytlewski, met with Oszust and plaintiff and advised them that their ongoing conflict was undermining morale and that either or both could be terminated if they did not resolve their differences. Although Rytlewski told Oszust that plaintiff was not a "snitch" for reporting safety concerns, Rytlewski also responded favorably to Oszust's statement that Oszust got along well with his coworkers.

Following the meeting, plaintiff worked his usual shift with Tim Corbin as his partner. After completing their route the two men drove to the service garage to refill their truck with hydraulic fluid. Adam Riedlinger, a temporary employee, was cleaning the garage floor with a power washer. Plaintiff told Riedlinger to stop cleaning the floor so that he and Corbin could bring the truck into the garage. According to plaintiff, Riedlinger sprayed him with the power washer. Plaintiff tried to grab the power washer nozzle away from Riedlinger, but was unable to wrest control of the wand from Riedlinger. Plaintiff complained to Bob Harrison, the supervisor of the mechanics staff, but Harrison declined to get involved. Plaintiff returned to the garage and

accused Riedlinger of operating the power washer in an unsafe manner. Plaintiff claimed that Riedlinger swore at him. Plaintiff grabbed Riedlinger by the shirt, pushed him, and told him to "knock it off" to prevent Riedlinger from spraying him again. Plaintiff admitted in his deposition that he physically grabbed Riedlinger.

Michael Morin, plaintiff's immediate supervisor, interviewed plaintiff, Riedlinger, and other witnesses to the incident and concluded that Riedlinger provoked plaintiff by spraying him with the power washer. However, Christopher Lewis, the Human Resources director, determined that plaintiff violated defendant's zero tolerance workplace violence policy by unjustifiably confronting and assaulting Riedlinger. Lewis terminated plaintiff's employment.

Plaintiff brought this action under the WPA. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that even if plaintiff had engaged in protected activity under the WPA, there was no causal connection between his protected activity and the decision to terminate his employment for violation of the workplace violence policy. The trial court agreed and granted defendant's motion for summary disposition.

We review de novo a trial court's decision granting summary disposition. *Hamed v Wayne Co*, 490 Mich 1; 803 NW2d 237 (2011). A motion under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 641; 802 NW2d 717 (2010). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Id*.

The WPA provides that an employer shall not discharge or otherwise retaliate against an employee because the employee "reports or is about to report . . . a violation or a suspected violation of a law or regulation" to a public body. MCL 15.362. Thus, the WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body. *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). A prima facie case under the WPA arises where (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the adverse employment decision. *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). "If a plaintiff is successful in establishing a prima facie case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action." *Id*., quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). "Once the defendant produces such evidence, the plaintiff has the burden to establish that the employer's proffered reasons were a mere pretext for the adverse employment action." *Shaw*, 283 Mich App at 8, quoting *Roulston*, 239 Mich App at 281.

"Once the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered." *Roulston*, 239 Mich App at 281. The question of pretext is analyzed with respect to four standards: (1) whether the plaintiff's involvement in protected activity contributed to the adverse employment decision, no matter how remote; (2) whether the plaintiff's protected activity was a substantial factor in the adverse decision, (3) whether the plaintiff's protected activity was the principal, but not sole, reason for

the adverse decision, or (4) whether the plaintiff's employment would have been terminated if there had been no protected activity. *Id*. "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id*.

"Summary disposition for the defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 184; 665 NW2d 468 (2003). The plaintiff must "demonstrate that the adverse employment action was in some manner influenced by the protected activity." *Id*. at 185. A temporal relationship between the protected activity and the adverse employment decision, by itself, is insufficient to establish a causal connection between the protected activity and adverse decision. *Id*. at 186. A plaintiff's involvement in protected activity under the WPA does not immunize him from an otherwise legitimate or unrelated adverse employment decision. *Id*. at 187.

The sole issues in this appeal are whether plaintiff demonstrated a genuine issue of material fact with respect to the existence of a causal connection between his protected activity and defendant's termination of his employment, and, if so, whether he can establish that defendant's proffered reason for the termination is pretextual.

In *West*, 469 Mich 177, the plaintiff made a police report against a union committee member who allegedly shoved the plaintiff. *Id*. at 181. Eight months later, the plaintiff's employment was terminated for repeatedly claiming overtime that he had not worked. *Id*. at 180. The incidents of the plaintiff's false reports of overtime occurred both before and after the alleged shoving incident. *Id*. at 181. Our Supreme Court held that the plaintiff failed to establish the necessary causal connection where there was no evidence that the supervisors involved in the decision to discharge the plaintiff were aware that the plaintiff made a police report. *Id*. at 187-188.

In *Shaw*, the plaintiff fire captain testified against the defendant city in June 2006 in an employment discrimination case. After the trial, the fire chief warned him that he was "in trouble" and that the city would "go after [him]" because of his testimony. *Shaw*, 283 Mich App at 3. In July 2006, the city's mayor filed departmental charges against the plaintiff, who allegedly was "forced to retire" in late July 2006 because of the stress caused by the charges. The defendant denied him retirement benefits. *Id*. at 4. This Court held that the evidence was sufficient to support the causation element because the close proximity between the plaintiff's protected activity and the adverse employment decision, the fire chief's warning, and the unprecedented nature of the disciplinary action supported an inference that the disciplinary action was a pretext for retaliation. *Id*. at 15-16.

In *Heckmann v Detroit Chief of Police*, 267 Mich App 480; 705 NW2d 689 (2005), overruled on other grounds in *Brown v Mayor of Detroit*, 478 Mich 589, 595; 734 NW2d 514 (2007), the plaintiff, a civilian employee of the Detroit Police Department, wrote a letter in September 2002 to the incoming chief of police reporting "gross mismanagement and fraud within the department." *Id*. at 482-483. In April 2003, the deputy chief of police discussed the letter with the plaintiff and told him "that he should 'start looking for a job elsewhere' if he kept 'making waves' and forcing [the deputy chief] to waste her time." *Id*. at 483. This Court held

that this evidence was sufficient to support an inference that the deputy chief threatened the plaintiff with discharge in retaliation for the letter he wrote seven months previously. *Id*. at 491-492.

In *Roulston*, 239 Mich App 270, the plaintiff, a social services director employed by the defendant nursing home, reported her suspicions of patient abuse to the Department of Consumer and Industry Services and to the Health Care Fraud Unit of the Attorney General's Office. *Id*. at 275. The plaintiff told the nursing home's social services consultant that she had spoken to "people at the state" about her concerns of abuse. *Id*. at 277. That same morning, Robert VanRhee, the nursing home's administrator, terminated the plaintiff's employment. The plaintiff testified at trial that VanRhee was "angry, red in the face" when he told the plaintiff "You're through," and that he monitored her while she collected her possessions and left the building. *Id*. The plaintiff brought an action against the defendant under the WPA, and subsequently prevailed against the defendant following a jury trial. On appeal, this Court rejected the defendant's argument that the evidence did not show that VanRhee knew about the plaintiff's report to state investigators when plaintiff was terminated. *Id*. at 277-278. This Court affirmed the judgment for the plaintiff because the "extent of VanRhee's anger, being red in the fact, his abrupt 'you're through, as well as his standing by until plaintiff removed her belongings and left the building" was sufficient to establish that VanRhee knew of the plaintiff's protected activity at the time he terminated her employment. *Id*. at 280. This Court further held that the evidence was sufficient to establish that the defendant's proffered reason for terminating the plaintiff, namely her poor work performance, was pretextual. The Court noted that the defendant's admission that the plaintiff "inherited a paperwork backlog from her predecessor" and the occurrence of her termination within hours of revealing that she had reported suspected abuse to the state, "could sustain a reasonable inference that her performance was really a pretext for retaliation on the part of defendants." *Id*. at 282.

In the present case defendant argues that plaintiff failed to submit any evidence of causation other than a temporal connection between his whistleblowing activities and termination. We disagree. On the morning of the power washer incident that led to plaintiff's termination, Rytlewski met with plaintiff and Oszust and advised them that their conflict was undermining department morale and that either or both could be terminated if they failed to resolve their conflict. Although plaintiff admitted that Rytlewski told Oszust that plaintiff acted properly in reporting his concerns, plaintiff also stated that Rytlewski responded favorably to Oszust's statement that he (Oszust) got along with the other employees. A trier of fact could infer from these circumstances that Rytlewski regarded Oszust and plaintiff as equally to blame for the morale problem, and that plaintiff's failure to get along with his coworkers was equally or more problematic than Oszust's resentment of plaintiff for reporting safety concerns. Defendant emphasizes that Oszust, and not plaintiff, was disciplined for the collision on January 14, 2009, thereby indicating that defendant harbored no animus against plaintiff for reporting that incident and other incidents. However, Rytlewski's response to the workplace tension that followed could cause a trier of fact to infer that defendant perceived plaintiff as a liability who should be quieted or eliminated for the sake of workplace cohesion. Accordingly, plaintiff established more than a temporal connection between his protected activity and the decision to discharge. The meeting with Rytlewski served as the extra evidence of a causal connection, comparable to the fire chief's threat in *Shaw*, 283 Mich App at 15-16, the deputy chief's threat in *Heckmann*,

267 Mich App at 491-492, and the administrator's angry dismissal of the plaintiff in *Roulston*, 239 Mich App at 280-282.

Nonetheless, summary disposition for defendant was proper because plaintiff failed to rebut defendant's proffered legitimate reason for his discharge by showing that it was a mere pretext for retaliation. Plaintiff admitted that he pushed Riedlinger during their second confrontation, which occurred after plaintiff returned to the garage while Corbin was refilling the truck's hydraulic fluid outside the garage. Defendant determined that there was no reason for plaintiff to return to the garage for a second confrontation with Riedlinger. Other witnesses present in the garage reported that Riedlinger was working with a squeegee, not the power washer, when plaintiff returned to the garage. Defendant had sufficient reason to believe that plaintiff's motivation in shoving Riedlinger was anger, not self-defense, and that plaintiff used poor judgment in resorting to a physical altercation instead of pursuing a nonviolent response. Although this altercation occurred on the same day that Rytlewski suggested that plaintiff's whistleblowing activities were as problematic as Oszust's safety violations, there is no indication that Rytlewski was involved in the termination decision, or that Lewis shared Rytlewski's perceptions that plaintiff had a negative effect on the workplace.

Plaintiff suggests that defendant's reliance on the zero tolerance workplace violence policy was pretextual because defendant did not consistently enforce the policy. Plaintiff emphasizes that Riedlinger was not disciplined for spraying plaintiff with the power washer. Plaintiff also relies on a previous incident in which defendant terminated the alleged victim of a violent incident, but did not discipline the aggressor. Although this evidence might show that defendant was not always consistent or evenhanded in enforcing the policy, it does not show that defendant's decision in this case was a mere pretext to get rid of an employee defendant regarded as an annoyance. Under these circumstances, plaintiff did not establish that his protected activity was a substantial or principal factor in his discharge, or that he would not have been terminated if there had been no protected activity. *Roulston*, 239 Mich App at 281.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray